

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

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	:	
UNITED STATES OF AMERICA,	:	
	:	
v.	:	
	:	
JAMES GATTO,	:	Case No. S2 17-cr-00686 (LAK)
a/k/a "Jim,"	:	
MERL CODE, and	:	
CHRISTIAN DAWKINS,	:	
	:	
Defendants.	:	
-----	X	

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION  
FOR LEAVE TO FILE AN *EX PARTE* MOTION UNDER SEAL FOR THE  
ISSUANCE OF A RULE 17(C) SUBPOENA TO THOMAS JOSEPH "TJ" GASSNOLA**

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Defendants James Gatto, Merl Code and Christian Dawkins respectfully submit this memorandum of law in support of their motion for leave to file an *ex parte* motion under seal for the issuance of a Rule 17(c) subpoena to cooperating witness Thomas Joseph “TJ” Gassnola.

### **ARGUMENT**

Defendants seek Your Honor’s leave to file an *ex parte* motion under seal for the issuance of a subpoena pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure to cooperating witness Thomas Joseph “TJ” Gassnola. Defendants seek to file the motion *ex parte* and under seal so as not to prematurely reveal Defendants’ trial strategies.

Courts in this district have traditionally permitted the *ex parte* issuance of Rule 17(c) subpoenas where the moving party would be required to prematurely disclose its trial strategy, witness list, or other privileged information in its application. *See e.g., United States v. Wey*, 252 F. Supp. 3d 237, 243–44 (S.D.N.Y. 2017) (granting defendant’s request to submit *ex parte* application given concerns about revealing trial strategy); *United States v. Weissman*, No. 01 CR 529(BSJ), 2002 WL 1467845, at \*1 (S.D.N.Y. July 8, 2002) (same); *see also United States v. Kravetz*, 706 F.3d 47, 54 (1st Cir. 2013) (“[T]here is scant value and considerable danger in a rule that could result in requiring counsel for a criminal defendant to prematurely expose trial strategy to public scrutiny. Accordingly, we agree with those courts that have found that public access has little positive role in the criminal discovery process.”). This is because “[t]here are strong policy reasons in favor of an *ex parte* procedure” where the moving party “may have to detail its trial strategy or witness list in order to convince a court that the subpoena satisfies the *Nixon* standards of specificity, relevance, and admissibility.” *United States v. Reyes*, 162 F.R.D. 468, 470 (S.D.N.Y. 1995). In particular, “[i]f a full adversary hearing was required

to obtain a subpoena *duces tecum*, a party would be forced to reveal this information to the opposing side, a result which would occur even if a court declined to issue the subpoena.” *Id.*

As such, Defendants move the Court to grant them leave to file, under seal, an *ex parte* motion and memorandum of law in support of the issuance of the proposed subpoena, which will explain the reasons that Defendants seek the documents requested therein, and why the subpoena meets the standards of Rule 17(c). A proposed order granting the instant motion is attached hereto as Exhibit A.

### **CONCLUSION**

Accordingly, this Court should grant Defendants leave to file an *ex parte* motion under seal for the issuance of a Rule 17(c) subpoena to Thomas Joseph “TJ” Gassnola.

Dated: New York, New York  
September 13, 2018

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